Supreme Court, U.S.
FILED
FEB 22 2010
OFFICE OF THE CLERK

No. 09-725

In The
Supreme Court of the United States

THOMAS M. BEAVER, M.D.; SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.; AND THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

JAMES J. TAYLOR JR.
TAYLOR & TAYLOR P.A.
Post Office Box 2000
Keystone Heights, Florida 32656
(352) 473-8088
Email: jtaylor@taylorandtaylorpa.com

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	8
I. Petitioners Seek To Subvert, Not Uphold, The Attorney-Client Relationship	8
II. *Dannemann* Did Not Deny The Petitioner Physicians The Right To Retain Counsel Of Their Choosing	10
III. Physicians' Legitimate Desire To Consult With Counsel Is Not Infringed By Section 456.057(8)'s Privacy Right	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Acosta v. Richter, 671 So. 2d 149 (Fla. 1996) 5, 12, 13, 14

Dannemann v. Shands Teaching Hospital and Clinics, Inc., 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied,* 19 So. 3d 987 (Fla. 2009).....*passim*

Hannon v. Roper, 945 So. 2d 534 (Fla. 1st Dist. Ct. App.), *rev. denied,* 967 So. 2d 198 (Fla. 2007) .....*passim*

Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th Dist. Ct. App.), *rev. dismissed,* 645 So. 2d 453 (Fla. 1994) 14

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982).....11

McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) 10, 11

STATUTES

Section 95.11(4)(b), Fla. Stat. (2007) 2

Section 456.057(7)(a), Fla. Stat. (2007) 14

Section 456.057(8), Fla. Stat. (2007).....*passim*

Section 768.28(6)(a), Fla. Stat. (2007) 2

Section 768.28(9)(a), Fla. Stat. (2007) 2

CONSTITUTIONAL PROVISIONS

Amend. I, U.S. Const. 12

INTRODUCTION

Respondent Patricia Dannemann respectfully submits this Brief in Opposition to the Petition For a Writ of Certiorari filed by Petitioners. As explained below, there is no compelling reason for this Court's review, and the Petition therefore should be denied.

STATEMENT OF THE CASE

The Petition omits important details about the factual context in which this matter arose in the Florida courts. That factual context demonstrates that the decision for which review is sought – *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009) – properly foreclosed a practice that abused the attorney-client relationship.

Respondent brought the action below against Shands Teaching Hospital and Clinics, Inc. ("Shands"), for negligence of its nursing staff resulting in the death of Respondent's husband, Stephen Dannemann. Respondent's complaint alleges that Shands' nurses, during routine turning of Mr. Dannemann from side to side, negligently pulled a previously attached tube from his heart, causing him to hemorrhage into his chest, resulting in his death.

In the course of the lawsuit, Respondent's counsel sought to schedule depositions of the three Petitioner

physicians. Dr. Beaver was one of Mr. Dannemann's treating physicians. Drs. Normann and Cardona were not involved in Mr. Dannemann's care; *they are pathologists who participated only in the post-mortem examination of the deceased.*

The doctors and their employer, the University of Florida Board of Trustees ("UFBOT"), *are not and will not be defendants in the case.* Respondent does not claim that any of the doctors did anything wrong. She has made clear that she will not sue them or their employer, UFBOT – in fact, it is clear that *she is barred by law from suing them.*[1] It is thus undisputed that neither the doctors – two of whom in any event are pathologists who did not see Mr. Dannemann until after he was dead – nor UFBOT have any expectation whatsoever of being sued for Mr. Dannemann's death.

Nevertheless, the University of Florida Self-Insurance Program ("SIP" or "UFSIP"), which insures and defends Shands, UFBOT and UFBOT's doctors, hired counsel, at SIP's expense, to represent the three doctors in connection with their depositions. In the

---

[1] It was unrebutted in the lower courts that the applicable two-year statute of limitations in section 95.11(4)(b), Fla. Stat., has expired; that the three-year notice of claim period in section 768.28(6)(a), Fla. Stat., also has expired; and that the doctors and UFBOT are statutorily immune from suit under section 768.28(9)(a), Fla. Stat. (immunity applies absent an allegation of wanton, willful misconduct outside the course and scope of employment).

lower courts the Petitioner physicians made no pretense that they themselves had sought out legal representation; their identical affidavits, prepared for them by their SIP-appointed counsel, state merely that they "have agreed to allow [the same SIP-selected counsel] to represent" them.

SIP's assignment of counsel to represent the Petitioner physicians in this case continued a long-standing, and very troubling, practice of SIP: the use of assigned counsel as a conduit for an illicit flow of information about defense theories among Shands (the only defendant in the case), SIP (Shands' insurer), and non-party UFBOT physicians, through their common denominator – the lawyer assigned by SIP to represent the doctors.[2] This is the real harm that concerns Respondent, and other litigants against Shands, and which *Dannemann* and, before it, *Hannon v. Roper,* 945 So. 2d 534 (Fla. 1st Dist. Ct. App.), *rev. denied*, 967 So. 2d 198 (Fla. 2007), addressed: not so much a disclosure between the doctors and their attorney, but, rather, the potential for

---

[2] For example, the lower court record contains an excerpt from the trial transcript in another case against Shands, in which, as here, SIP hired an attorney (indeed, the same attorney as here) to represent another non-party UFBOT physician. In that case, the doctor acknowledged that the attorney and a SIP representative had engaged him in an ex parte, pre-trial conference to discuss the details of his treatment of the plaintiff's decedent and how the doctor could best "enlighten the jury" in his testimony. As disclosed in the lower court record, SIP has made it a practice to orchestrate this sort of back-channel line of communication.

clearly prohibited disclosures between the doctors or their assigned attorney, on the one hand, and, on the other hand, Shands, Shands' counsel and SIP representatives involved in Shands' defense.

That this is what is really at stake is made clear by Petitioners' own arguments, both in the courts below[3] and in their Petition to this Court.[4] These

---

[3] For example, the Petitioner physicians asserted in the trial court, through the identical affidavits prepared for them by their SIP-appointed counsel, that they should be free to discuss the deceased's confidential medical information not only with their SIP-appointed attorney, *but also "with UFBOT and . . . UFSIP, and Shands representatives, including . . . risk management and claims processing personnel, management and administrative employees. . . ."* (Emphasis added).

Furthermore, in their brief to the Florida First District Court of Appeal, Petitioners argued that section 456.057(8) could not be applied so as to "prevent *UFSIP risk managers* from having access to information from [the deceased's] treating physicians"; that the doctors should be free to communicate confidential patient information *"to UFBOT employees assigned to UFSIP, such as risk managers"*; that the doctors' SIP-appointed attorney *should be free to "transmit to UFSIP or Shands any protected information obtained [by the attorney] during such consultation [between the attorney and the nonparty doctors];* that there should be *no bar to "communications between a UFBOT-employed physician's lawyer, and UFSIP personnel"*; and that *confidential medical information cannot "be kept away from risk and claims [i.e., SIP] personnel."* In sum, Petitioners sought a broad ruling that section 456.057(8) "does not preclude attorney-client communications *or communications to risk managers*." (Emphases added).

[4] In the Petition, at page 17, Petitioners argue that they should be free to discuss confidential patient information not only with counsel, but also with "employers" and, of more

(Continued on following page)

arguments expose that the true interest Petitioners seek to advance is not the doctors' interest in consulting with counsel; it is the interest of Shands, SIP, and their defense team in communicating with the doctors, through the attorney that SIP hired for them. These arguments also reveal that the doctors are not the real parties in interest, and are not the ones making the arguments; Shands and SIP are.

The decisions of the Florida First District Court of Appeal in *Hannon* and *Dannemann* follow the Florida Supreme Court's holding in *Acosta v. Richter,* 671 So. 2d 149 (Fla. 1996), that section 456.057(8) (then numbered as section 455.241) "clos[ed] the door to the previous practice of many defense attorneys of meeting privately or otherwise communicating ex parte with plaintiff's treating physician." *Id.* at 152. The Florida Supreme Court thus foreclosed precisely the sort of impropriety about which Respondent is concerned: that SIP will use the attorney it hired as a conduit to debrief the non-party physicians so that the doctors will know the "party line" of Shands' SIP-funded defense. *Id.* at 156 ("We believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences.").

---

concern, with unspecified "management personnel." In the circumstances of this case, it fair to presume that "management personnel" is intended to encompass SIP risk managers involved with Shands' defense team.

This concern is underscored in this case by the fact that two of the three non-party doctors are ***pathologists*** who did not see Mr. Dannemann ***until after he died***. In the Florida courts, Petitioners sought to justify the three doctors' disclosure of Mr. Dannemann's privileged medical information to their attorney on the argument that the doctors needed legal advice to evaluate whether they should reasonably expect to be sued. Petitioners never offered an explanation as to why the ***pathologists*** would need legal advice as to whether ***they*** should reasonably expect to be sued. Respondent submitted in the courts below, and submits here, that the only plausible explanation for this obvious anomaly is the disturbing one posited above: that Shands and SIP seek to exploit the attorney-client relationship as a subterfuge to circumvent the plain language of section 456.057(8), and make sure that the pathologists know Shands' and SIP's defense theory as to the cause of Mr. Dannemann's death.

It is also significant that the Petitioner physicians have sworn, in the affidavits prepared for them by their SIP-appointed counsel, that they have *no information* about the deceased's medical care or condition other than what is contained in the medical records that Shands maintains. Petitioners emphasize that those records have now been the subject of discovery in the trial court, and as a result their contents are known to Shands, UFBOT and SIP.

Accepting all of that as true leads inescapably to the conclusion that the doctors have no information

that they could provide to an attorney to assist in evaluating whether they should reasonably expect to be sued – which Petitioners insisted throughout the lower court proceedings is the reason why the doctors needed counsel – other than what the attorney can see for himself in the medical records. It appears, therefore, based on Petitioners' own submissions below, that the purpose for the attorney-client communication *in this case* is not to facilitate the doctors' disclosure of information to the attorney, but, rather, the opposite: to facilitate the *attorney's* disclosure of information *to the doctors*. In light of SIP's past practice, it can reasonably be inferred that this reverse flow will include information about the defense theories of Shands' and SIP's defense team.

Tellingly, despite ample opportunities to do so, Petitioners have *never denied* – not in the trial court, nor in the First District, nor in the Florida Supreme Court – that that is exactly what they intend to do.

Under *Dannemann* and *Hannon*, the Petitioner physicians are free to retain counsel of their choosing; they may be represented by counsel during their depositions; and they may consult with counsel in anticipation of their depositions, with one restriction: since the doctors and their employer, UFBOT, have not been sued and will not and cannot be sued, the consultation may not include discussion of Mr. Dannemann's confidential medical information. That one restriction properly forecloses Shands' and SIP's

practice of funneling defense theories to the non-party doctors through SIP-appointed counsel.

ARGUMENT

This Court's review is unwarranted, and the Petition therefore should be denied, for the following reasons: (i) Petitioners seek judicial approval to continue a practice that has subverted, not upheld, the attorney-client relationship; (ii) *Dannemann* does not deny the Petitioner physicians the right to counsel of their choosing; and (iii) the Petitioner physicians' legitimate right to consult with counsel is not infringed by section 456.057(8)'s privacy right. These reasons for denial of review are addressed separately below.

I. Petitioners Seek To Subvert, Not Uphold, The Attorney-Client Relationship.

As noted above, the record of the proceedings below makes clear that the true interest sought to be advanced in this case is not the doctors' interest in consulting with legal counsel. It is the interest of Shands, SIP and their defense team in communicating with the doctors, through the lawyer chosen for them by SIP. That is why Shands and UFBOT insisted in the Florida courts that ***the doctors' SIP-assigned lawyer should be free to "transmit to UFSIP or Shands any protected information***

obtained [by the lawyer] during such consultation [between the lawyer and his ostensible client, the non-party physician]." That is why they sought judicial authorization, despite section 456.057(8)'s plain prohibition, for unrestricted "communications ***between a UFBOT-employed physician's lawyer, and UFSIP personnel.***"

This position, if it were to receive the judicial stamp of approval that Petitioners seek, would not uphold the attorney-client relationship; to the contrary, it would authorize the subversion of that relationship, by authorizing precisely that which Respondent fears: use of SIP-appointed counsel as a conduit to funnel information about Shands/SIP defense theories to non-party physicians who have not been sued and have no expectation whatsoever of being sued – and who, presumably for that reason, did not themselves seek out legal representation.

The record in the proceedings below shows, moreover, that this fear is not hypothetical; it is, rather, well-founded, because it is exactly the practice in which Shands and SIP engaged in other cases before they were foreclosed from doing so in *Hannon* and then again in *Dannemann*. The importance of the attorney-client relationship in our system of justice is far too great to risk its being used for the ulterior purposes intended by Shands and SIP.

II. Dannemann Did Not Deny The Petitioner Physicians The Right To Retain Counsel Of Their Choosing.

Petitioners cite cases holding that in civil litigation as well as criminal cases there is a right to retain counsel of one's own choosing. The holdings in *Dannemann* and *Hannon* are not to the contrary. The Petitioner physicians are free to retain counsel of their choosing to represent them in connection with their depositions. The only restriction that *Dannemann* and *Hannon* impose on that freedom is that the attorney may not be one appointed by SIP for the purpose of funneling information back and forth between the doctors and the Shands/SIP defense team.

That limitation implicates no constitutional protection. As the Fifth Circuit recognized in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983) – one of the cases cited in the Petition – while civil litigants' right to counsel "ordinarily implies a right to lawyers of their choice," that right

> . . . *does not, however, entail absolute freedom of choice*. Counsel must be a member of the bar and must be admitted to practice before the court in which he appears. He must not have a conflict of interest with another party. His employment must not entail disclosure of confidential information. *The choice is never completely unfettered.*

* * *

> * * * The right [to counsel] should be balanced in cases in which it is challenged against the right to "untainted prosecution of the lawsuit" and society's need to maintain the highest ethical standards of professional responsibility. It cannot be exercised without thought also to the needs of effective administration of justice. * * *

Id. at 1262-63 (Emphases added).

See also Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) (attorney-client privilege may be limited "where the privileged relationship is abused").

Those considerations, in the peculiar factual context of this case, richly support – indeed, Respondent submits that they *compel* – the limitation set down in *Dannemann* and *Hannon.*

III. Physicians' Legitimate Desire To Consult With Counsel Is Not Infringed By Section 456.057(8)'s Privacy Right.

Section 456.057(8) reflects a careful and constitutionally permissible balancing of patients' expectation that their confidential medical information will remain private, with health care practitioners' legitimate need for disclosure of that information in certain circumstances. Among the statute's exceptions, for example, is one that allows disclosure among health care providers who are involved in the patient's treatment, during the time that the patient is under their care. Another exception is the one that

was at issue below, which allows the provider to disclose confidential patient information "when [the provider] is or reasonably expects to be named as a defendant."

The First District Court of Appeal's application of the latter exception in *Dannemann* is consistent with the Florida Supreme Court's "common sense interpretation" of the exception in *Acosta v. Richter*, 671 So. 2d 149, 156 (Fla. 1996). As the Florida Supreme Court observed in that case, "a defendant-physician is free, under the statute, to discuss his knowledge of the patient in order to properly defend himself" – that is, otherwise confidential patient information "may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case." *Id.* (quoting legislative history of the statute).

The Florida Supreme Court further found in *Acosta* that the Florida legislature's "balancing [of] a patient's individual privacy with society's reasonable need for limited disclosure of medical information," as that balance was struck in section 456.057(8), raised no constitutional concern, and was within the legislature's "considerable latitude in providing Florida citizens with a high degree of privacy in their medical information." *Id.*[5]

---

[5] Petitioners argue that *Acosta* is distinguishable because, although in that case the statute *was* challenged on First Amendment free speech grounds, nevertheless the challenge did

(Continued on following page)

Nothing in the facts of this case warrants a reconsideration of the Florida Supreme Court's conclusion that section 456.057(8) reflects a constitutionally permissible balancing of interests. Indeed, there simply is no legitimate competing interest to balance in this case. No one disputes that the doctors can be represented by counsel at their depositions. Nor is it seriously disputed that the doctors (again, *two of whom are pathologists who never saw the deceased alive*) have no reasonable expectation of being sued, because of the running of the statute of limitations and their statutory immunity from suit, if nothing else.

Further, the doctors themselves have testified that they *have nothing to disclose* about Mr. Dannemann except what is contained in the Shands medical records, which have been the subject of discovery in the trial court.[6] Therefore, if the doctors

---

not arise in a so-called "right-to-counsel" context. Respondent submits, however, that the concerns are nevertheless the same. Indeed, under the facts in this case, where Shands and SIP seek to use the attorney-client relationship as a subterfuge, the conclusion that constitutional protection is lacking is even more compelling than was the case in *Acosta*, where at least the subterfuge did not involve exploitation of attorney-client communications.

[6] In the courts below, Shands and SIP tried to use that testimony to argue that, since the doctors have no information to disclose, there is nothing in section 456.057(8) to preclude their participating in discussions about Mr. Dannemann with Shands, SIP and the Shands/SIP defense team, including legal counsel. However, even if it were true that the doctors themselves have

(Continued on following page)

desired a legal opinion that they are not subject to liability, that opinion can be rendered – indeed, would necessarily have to be rendered – based on the medical records alone. The doctors, by their own testimony, have nothing to add to those records.

The only competing interest here is Shands' and SIP's illegitimate interest in maintaining a back-channel line of communication from the Shands defense team to the doctors, through counsel selected for the doctors by SIP, so the doctors can be forewarned about Shands' and SIP's defense theories. This improper practice enjoys no constitutional protection. *Dannemann, Hannon* and *Acosta* properly foreclosed it. Indeed, to allow the practice to continue, with judicial approval, would seriously erode the confidence of litigants, and the public, that – at least

---

no information to disclose, other than what the records show, they are still precluded by Florida law from "discuss[ing]" Mr. Dannemann's medical condition "with any person," except in statutorily-defined circumstances not presented here. Section 456.057(7)(a), Fla. Stat. (Petitioners do not challenge that subsection of the statute.) *Acosta* appropriately disapproved such ex parte conferences in which the physician says nothing, but learns from the other participants the "party line" about the defense of the case, so that the physician can pattern his or her testimony accordingly. 671 So. 2d at 156. As *Acosta* also observed, such unsupervised ex parte conferences must be avoided, because "medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place." *Id.* at 153 (quoting *Kirkland v. Middleton*, 639 So. 2d 1002, 1004 (Fla. 5th Dist. Ct. App.), *rev. dismissed*, 645 So. 2d 453 (Fla. 1994)).

where Shands and SIP are concerned – the process of finding the truth through discovery and trial proceedings is conducted fairly and on a level playing field.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted this 22nd day of February, 2010.

TAYLOR & TAYLOR P.A.

JAMES J. TAYLOR JR.
Florida Bar No. 334057

Post Office Box 2000
Keystone Heights, Florida 32656
Telephone: 352-473-8088
Email: jtaylor@taylorandtaylorpa.com

Attorneys for Respondent